(2)

No. 86-367

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
CLERK

IN THE

UNITED STATES SUPREME COURT

October Term, 1987

NEW MEXICO TAXATION AND
REVENUE DEPARTMENT,

Petitioner,

V.

RAMAH NAVAJO SCHOOL BOARD, INC.

AND

LEMBKE CONSTRUCTION COMPANY, INC.

Respondents.

ON CERTIORARI TO
THE COURT OF APPEALS OF NEW MEXICO

RESPONDENT RAMAH NAVAJO SCHOOL BOARD INC.'S BRIEF IN OPPOSITION

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October 1986

QUESTION PRESENTED

Did the New Mexico Court of Appeals err in holding that attorney's fees were properly awarded by the district court under 42 U.S.C. §1988 because the Petitioner Tax Department had violated rights conferred on Respondent Ramah Navajo School Board by treaty, general federal statutes, and a comprehensive Indian education scheme -- The Indian Self-Determination And Education Assistance Act, 25 U.S.C. §§450 et. seq. -- as well as a series of direct appropriations by Congress to Respondent Board for construction of the Ramah Navajo School?

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ADDITIONAL STATUTES AND TREATY INVOLVED

1868 Treaty between the United States and the Navajo Tribe, 15 Stat. 668 and 669:

> Art. II ... and the United States agrees that no persons except those herein so authorized to do, and except such officers, soldiers, agents and employés of the government, or of the Indians, as may be authorized to enter upon Indian reservations in discharge of duties imposed by law, or the orders of the President, shall ever be permitted to pass over, settle upon, or reside in, the territory described in this article.
>
> Art. VI. In order to insure the civilization of the Indians entering into this treaty, the necessity of education is admitted....

Public Law 92-369, 86 Stat. 508, 510 (1972):

> For construction, ... of ... buildings and other facilities;
>
> Provided further, that not to exceed $950,000 shall be for assistance to the Ramah School on the Navajo Indian Reservation, New Mexico;

Public Law 93-120, 87 Stat. 431:

> For construction, major repair and improvements of irrigation and power systems, buildings, utilities, and other facilities; acquisition of lands and interests in lands; preparation of lands for farming; and architectural and engineering

services contract, $53,703,000 to remain available until expended....

Public Law 93-245, 87 Stat. 1073:

Provided further, That $2,700,000 of the amount appropriated under this heading in the Department of Interior and Related Agencies Appropriation Act, 1974, shall be available for assistance to the Ramah Navajo School Board, Incorporated, New Mexico, for the construction of school facilities.

Public Law 93-404, 88 Stat. 810:

Provided further, That not to exceed $1,195,000 shall be available to assist the Ramah Navajo Board, Inc., including not to exceed $800,000 for construction of school facilities and not to exceed $395,000 for purchase of school equipment.

Public Law 94-165, 89 Stat. 985:

Provided further, That not to exceed $2,229,000 shall be available for assistance to the Ramah Navajo School Board, Incorporated, New Mexico, for the construction of school facilities.

Public Law 95-74, 91 Stat. 293:

Provided further That not to exceed $2,062,000 shall be available for assistance to the Ramah Navajo School Board, Incorporated, New Mexico, for the construction of an Instructional Media Center.

Additional relevant portions of the Indian Self-Determination Act, 25 U.S.C. §§450 et seq., January 4, 1975, 88 Stat. 2203-2217:

§ 450n. Sovereign immunity and trusteeship rights unaffected

Nothing in this Act shall be construed as --

(1) affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe; or

(2) authorizing or requiring the termination of any existing trust responsibility of the United States with respect to the Indian people.

§ 458. School construction, acquisition, or renovation contracts-- Authorization; prerequisites

(a) The Secretary is authorized to enter into a contract or contracts with any State education agency or school district for the purpose of assisting such agency or district in the acquisition of sites for, or the construction, acquisition, or renovation of facilities (including all necessary equipment) in school districts on or adjacent to or in close proximity to any Indian reservation or other lands held in trust by the United States for Indians, if such facilities are necessary for the education of Indians residing on any such reservation or lands.

Eligibility of private schools to receive funds; maximum amount

(c) The Secretary may expend not more than 25 per centum of such funds as may be authorized and appropriated pursuant to this section on any school eligible to receive funds under section 458d of this title.

§458d. Same, eligibility for funds of tribe or tribal organization controlling or managing private schools; report to Congressional Committees

The Secretary is authorized and directed to provide funds, pursuant to this Act; the Act of April 16, 1934; or any other authority granted to him to any tribe or tribal organization which controls and manages any previously private school. The Secretary shall transmit annually to the Committees on Interior and Insular Affairs of the United States Senate and House of Representatives a report on the educational assistance program conducted pursuant to this section.

25 U.S.C. 2010, Public Law 95-561, Title XI, §1130, November 1, 1978, 92 Stat. 2321:

It shall be the policy of the Bureau in carrying out the functions of the Bureau, to facilitate Indian control of Indian affairs in all matters relating to education.

The Johnson O'Malley Act 25 U.S.C. 452, April 16, 1934 c. 147, §1, 48 Stat. 596; June 4, 1936, c. 490, 49 Stat. 1458:

The Secretary of the Interior is authorized, in his discretion, to

enter into a contract or contracts with any State or Territory, or political subdivision thereof, or with any State university, college, or school, or with any appropriate State or private corporation, agency, or institution, for the education, medical attention, agricultural assistance, and social welfare, including relief of distress, of Indians in such State or Territory, through the agencies of the State of Territory or of the corporations and organizations, herein before named and to expend under such contract or contracts, moneys appropriated by Congress for the education, medical attention, agricultural assistance and social welfare, including relief of distress, of Indians in such State or Territory.

The Snyder Act, 25 U.S.C. Sec. 13, Nov. 2, 1921, C. 115, 42 Stat. 208:

> The Bureau of Indian Affairs under the supervision of the Secretary of the Interior, shall direct, supervise, and expend such moneys as Congress may from time to time appropriate, for the benefit, care, and assistance of the Indians throughout the United States for the following purposes:
>
> General support and civilization, including education....

New Mexico Disclaimer of Jurisdiction over Indian Lands, Enabling Act, Sec. 2(B), 36 Stat. 558-559, N.M. Const., Art. XXI, sec. 2:

> ...but nothing herein provided for,

> shall preclude the said state from taxing, as other lands and other property are taxed, any lands and other property outside of an Indian reservation owned or held by any Indian, save and except such lands as have been granted or acquired as aforesaid or as may be granted or confirmed to any Indian or Indians under any act of congress; but said ordinance shall provide that all such lands shall be exempt from taxation by said state so long as to such extent as congress has prescribed or may hereafter prescribe;

The Buck Act, 4 U.S.C. §109, 61 Stat. 645:

> Nothing in Sections 105 and 106 of this title shall be deemed to authorize the levy or collections of any tax on or from any Indian that otherwise taxed.

REGULATIONS INVOLVED

1. The relevant portions of the regulations implementing the Indian Self-Determination Act, supra, found at 25 C.F.R. Parts 271 and 274, are reproduced in Appendix C.

2. The relevant portions of the regulations implementing Title XI of Public Law 95-561, supra, found at 25 C.F.R. Part 32, are reproduced in Appendix D.

ADDITIONS TO STATEMENT OF THE CASE

Respondent Ramah Navajo School Board, Inc. is a Navajo tribal school board and is incorporated under New Mexico law.

The State of New Mexico failed to provide educational services to the Ramah Navajo community starting in 1968 when it closed a public high school serving the community and failed to make proper provision for Ramah Navajo children elsewhere.

Among the laws which the Board alleged had been violated by the Petitioner's tax was a series of Congressional appropriations specifically earmarked to this Respondent for the purpose of constructing this particular school. Pub. L. 92-369, 86 Stat. 510 (1972); Pub. L. 93-245, 87 Stat. 1073 (1973) (amending Pub. L. 93-120, 87 Stat. 431 (1973)); Pub. L. 93-404, 88 Stat. 810 (1974); Pub. L. 94-165, 89 Stat. 985 (1975); Pub. L. 95-74, 91 Stat. 293 (1977).

These appropriations were conveyed to Respondent Board through a series of contracts with the Bureau of Indian Affairs mandated by The Indian Self-Determination And Education Assistance Act. See, Ramah Navajo School Bd. v. Bureau of Rev.., 458 U.S. 832, at 835 and 841 (1982).

The Board has already paid the legal fees at issue in this petition from the tax refund resulting after mandate issued in Ramah, supra. Only fees incurred in connection with the instant motion for fees have not yet been paid. (See Appendix A.) Recovery of the fees at issue here would therefore make the Board whole.

REASONS FOR DENYING THE WRIT

The respondent, Ramah Navajo School Board, Inc., respectfully requests that this Court deny the Petition for Writ of Certiorari, seeking review of the New Mexico Court of Appeals' decision in this case. That opinion is reported at _____

N.M. _____, 720 P.2d 1243 and is printed at Appendix A to the Petition.

(1) The Principal Issue Addressed By The Petition Has Already Been Settled.

Petitioner's whole argument proceeds on the assumption that this Court in deciding Ramah Navajo School Bd. v. Bureau of Rev., supra, failed to find a State violation of an individual right conferred or guaranteed by federal law. Yet less than ten years earlier, in McClanahan v. Arizona State Tax Comm'n, 411 U.S. 164, at 181 (1973), this Court unanimously found just such a violation in the case of a Navajo living and working on the Navajo reservation who had been assessed an Arizona income tax:

> Finally, we cannot accept the notion that it is irrelevant "whether the ... state income tax infringes on [appellant's] rights as an individual Navajo Indian," as the State Court of Appeals maintained. 14 Ariz. App. at 454, 484 P.2d at 223. To be sure, when Congress has legislated on Indian matters, it has, most often, dealt with the tribes as collective entities. But those entities are, after all, composed of individual Indians, and the legislation

> confers individual rights. This court has therefore held that "the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them." Williams v. Lee, supra, at 220 (358 U.S. 217) ... In this case, appellant's rights as a reservation Indian were violated when the state collected a tax from her which it has no jurisdiction to impose. (emphasis added)

Ramah, supra, relies expressly on this earlier holding:

> In White Mountain (Apache Tribe v. Bracker, 448 U.S. 1 (1980)), we recognized that the federal and tribal interests arise from the broad power of Congress to regulate tribal affairs under the Indian Commerce Clause, Art. I, §8, cl. 3, and from the semi-autonomous status of Indian tribes. 448 U.S., at 142, 100 S.C.t., at 2583. These interests tend to erect two 'independent but related' barriers to the exercise of state authority over commercial activity on an Indian reservation: state authority may be pre-empted by federal law, or it may interfere with the Tribe's ability to exercise its sovereign functions. Ibid. (citing, inter alia, Warren Trading Post Co. v. Arizona State Tax Comm'n, 380 U.S. 685, 85 S.Ct. 1242, 14 L. Ed. 2d 165 (1965); McClanahan v. Arizona State Tax Comm'n., supra; and Williams v. Lee, 358 U.S. 217, 79 S.Ct. 269, 3 L. Ed. 2d 251 (1959)).

458 U.S., at 837.

McClanahan is on all fours with the

instant case. An income tax was involved in both. See, 411 U.S., at 180, characterizing the gross receipts tax involved in Warren Trading Cost Co. v. Arizona State Tax Comm'n, supra, as an "income tax". Both involved reservation Indian activities and both involved the Treaty with the Navajos of 1868, 15 Stat. 668, and the same general laws of the United States, e.g., the Buck Act, 4 U.S.C. §105 et. seq., which determines when States may tax individuals on federal lands. Both also involve nearly identical state enabling legislation. See, New Mexico Enabling Act, 36 Stat. 558-559 §2(B), N.M. Const. Art. XXI, sec. 2. If anything the instant case more clearly concerns violation of individual rights because McClanahan involved no comprehensive regulatory scheme at all, let alone one as important as education. Nor did it involve direct appropriations to an Indian or Indian entity. See, infra, pp. 12-15.

(2) The Instant Case Does Not Present An Appropriate Vehicle For Examining The Question Presented.

This case arises from a singular set of facts. It involves a remote Indian community which formed a partnership with Congress to replace a lost public high school. In doing so Congress decided that the federal responsibility[1] for Indian education could be fulfilled at Ramah only if it financed construction of the new school directly through the community's own school board. It therefore enacted a series of direct appropriations to the

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[1] Congress has long recognized its responsibilities for Indian education. For example, in the legislative history for Public Law 98-511, 98 Stat. 2366, amending Public Law 95-561, House Report No. 98-748 contained this language:

> It is the clear and firm position of this Committee that with respect to those tribes with whom the Federal Government has a formal relationship, education is an affirmative responsibility. Moreover, it is one of the highest degree, requiring a fiduciary standard of care in administrative actions and special congressional attention.

Report, supra, at 16. (emphasis added)

Board as part of the broad Indian self-determination scheme first announced administratively by President Nixon and later made law through the Self-Determination Act, supra. Ramah Navajo School Bd. v. Bureau of Rev., 458 U.S., at 834.

By enacting the Self-Determination Act and the series of appropriations to this Board Congress conferred a unique right on Respondent to full use of that corpus. Yet the Tax Department would have this Court define the limits of a broad civil rights statute, 42 U.S.C. §1983, through a review of this case. It posits that many similar cases may surface in which Indian tribes will seek attorney's fees, yet it has not cited nor can Respondent find a single additional tax case in which Congress created a discrete fund for a named Indian tribe or organization.

Given the doctrinal singularity of the line of Indian tax cases starting at least

with McClanahan, supra,[2] which depend on a unique relationship between the Indian Commerce Clause, Art. I, §8, cl. 3, and the semi-autonomous nature of tribal governments, it is difficult to see how a review of the instant case could significantly advance understanding of Section 1983. Petitioner contends that ambiguity persists in the law of Section 1983 following Thiboutot-Middlesex-Pennhurst.[3] Yet even if this assumption were true, using an Indian tax case to refine or clarify the meaning of the phrase "Constitution or

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[2] Among those in this line are: Mescalero Apache Tribe v. Jones, 411 U.S. 145 (1973); Bryan v. Itasca County, 426 U.S. 373 (1976); Washington v. Conf. Tribes of Colville Res., 447 U.S. 134 (1980); Central Machinery Co. v. Arizona State Tax Comm'n, 448 U.S. 160 (1980); White Mountain Machinery Co. v. Bracker, 448 U.S. 136 (1980); and Ramah Navajo School Bd. v. Bureau of Rev., 458 U.S. 832 (1982)

[3] Maine v. Thiboutot, 448 U.S. 1 (1980); Middlesex County Sewerage Authority v. National Sea Clammers, 453 U.S. 1 (1981); Pennhurst State School and Hospital v. Halderman, 451 U.S. 1 (1981).

laws" in Section 1983 would be disadvantageous because so much of the Indian law in this area depends on a special linkage between the Indian Commerce Clause and the body of Indian statutes and case law which has built up over more than a century. In Indian tax cases, the distinction between the Constitution and laws of the United States has in some senses been blurred, rendering Indian cases quite ineffective as vehicles for examining broader questions focussing on that distinction.

(3) Even Within The Parameters of Existing Section 1983 Law, The Case Presents No Novel Question Or Issue.

The instant case falls squarely within the holding of Maine v. Thiboutot, supra, where federal social security welfare benefits had been denied by State action in violation of federal law. The benefits conferred on Plaintiff in that case, like the appropriations here, became legal entitlements after they were enacted by

Congress. See the lower court's discussion, Appendix A to Petition, pp. 19a-23a, 720 P.2d, at 1253-1255. This Court in Pennhurst, supra, recognized this point when it said:

> [R]espondents here, unlike the plaintiff in Thiboutot who alleged that state law prevented him from receiving federal funds to which he is entitled, can only claim that the State plan has not provided adequate 'assurances' to the Secretary. It is at least an open question whether an individual's interest in having a State provide these 'assurances' is a 'right secured' by the laws of the United States within the meaning of Section 1983. (emphasis added)

Pennhurst State School and Hospital v. Halderman, 451 U.S. 1, at 28 (1981). By necessary implication, then, this Court has already accepted that an individual's claim to a discrete federal appropriation constitutes a "right" within the meaning of Section 1983. That is exactly what we have here. Nothing more is needed.

However, to make the point even more clearly, Pennhurst may be distinguished on

several other grounds as well. The issue in that case concerned a so-called "Bill of Rights" in legislation for the handicapped. Plaintiffs there claimed that Section 6010 of the Developmentally Disabled Act, 42 U.S.C. §§ 6000, et. seq., created substantive rights enforceable through Section 1983 requiring affirmative state action to provide programs for the handicapped. Nothing in the Act expressly stated this intent nor was any money granted under the Act for this purpose. Plaintiffs were thus arguing that an affirmative state obligation to spend an unknown amount of money arose under the Act as an implied condition for receipt of federal funds granted under the Act for other purposes. The affirmative nature of the obligation sought to be imposed on states in Pennhurst contrasts completely with the prohibition against state action found in McClanahan and Ramah. As the Court noted in Pennhurst:

> The case for inferring intent is at its weakest where, as here, the rights asserted impose affirmative obligations on the states to fund certain services, since we may assume that Congress will not implicitly attempt to impose massive financial obligations on the States.

451 U.S., at 16.

It also contrasts with the presumption in Indian tax cases that the absence of explicit Congressional prohibitions against state taxation is not an expression of Congressional consent. When the Tax Department in this very case argued earlier that the presumption should go against the Board and in favor of the State, as is true in non-Indian situations, the Court replied: "This argument is clearly foreclosed by our precedents." 458 U.S., at 843. In short, in Pennhurst this Court held that the language in Section 6010 of the Disabled Act was "intended to be hortatory, not mandatory". 451 U.S., at 711. It held this way precisely because Pennhurst differed so radically on its

facts from Thiboutot; no federal funds were at issue in Section 6010 whereas social security funds, like the construction funds here, were at issue in Thiboutot.

(4) The Only Indian Tax Decision Involving Attorney's Fees Cited By Petitioner Was Incorrect In Its Holding And Easily Distinguished On Its Facts.

White Mountain Apache Tribe v. Williams, No. 81-5348 (Ninth Circuit, Slip Opinion, August 20, 1986), is the only case cited by Petitioner for the proposition that 42 U.S.C. §§1983 and 1988 do not extend to Indian preemption and related tax cases. First, that case was incorrectly decided because it fails to recognize that the tribe in question had enforceable rights under the timber regulations at issue there. Had the United States failed to enforce the timber scheme the tribe could presumably have sued for breach of trust or breach of administrative obligations to enforce those rights. See, e.g., United

States v. Mitchell, 463 U.S. 206 (1983); and Rockbridge v. Lincoln, 449 F.2d 567 (9th Cir. 1971). And see, Appendix B, pp. 17a-18a.

Given the doctrine announced in McClanahan v. Arizona State Tax Comm'n, supra, the Ninth Circuit erred in not recognizing the tribe's right to be free from state coercion including taxation. McClanahan, supra, 411 U.S., at 181. Congressional accommodation of the timber interests of the Apache Tribe in that case easily distinguish it from the trucking company in the dormant Commerce Clause case Consolidated Freightways v. Kassel, 556 F. Supp. 740 (S.D. Iowa 1983), aff'd 730 F.2d 1139 (8th Cir.), cert. denied, 105 S.Ct. 126 (1984), principally relied upon by the majority in White Mountain. No legislation protecting truckers existed and thus there were no statutory rights involved in Kassel.

More generally, White Mountain contrasts

with several other Indian decisions, each of which held or implied that tax challenges by Indian tribes or individuals against state tax agencies or officials could be framed and prosecuted under 42 U.S.C. §1983. Confederated Salish and Kootenai Tribes v. Moe, 392 F. Supp. 1297, at 1304-5 (D. Mont. 1974), aff'd other grounds, 425 U.S. 463 (1976); Chase v. McMasters, 573 F.2d 1011, 1014-16 (8th Cir. 1978), cert. denied, 439 U.S. 965 (1978); and see especially, Central Machinery Co. v. State of Arizona, No. CA-CIV 7779, June 27, 1985, 12 Indian Law Reporter 5073, cert. pending Arizona Supreme Court, which discusses the issues involved here at length. (Reproduced in Appendix B.) (But, see, the non-tax decision in Yakima Indian Nation v. Whiteside, 617 F.Supp. 735 (E.D.Wash. 1985)).

Yet, even if all this were not true, White Mountain clearly involves facts which

differ fundamentally from the instant case on the point at issue here. Thus:

White Mountain involved no contracts between the federal government and an Indian tribe or organization.

White Mountain involved no direct appropriation of funds creating a corpus earmarked for a particular Indian entity.

White Mountain did not involve education, "perhaps the most important function of state and local government," Brown v. Board of Education, 347 U.S. 483, at 493 (1954), quoted in the decision below, Appendix A to the Petition, at 22a, 720 P.2d, at 1255.

Finally, White Mountain involved no third-party beneficiaries, such as the Indian children here whose rights have been recognized under contracts awarded pursuant to The Indian Self-Determination Act. Busby School of the Northern Cheyenne Tribe v. United States, 8 Cl.Ct. 596, at 602 (1985) and see, e.g., Natonabah v. Gallup-McKinley

County Sch. Bd., 355 F. Supp. 716 (D.N.M. 1973) (holding that individual rights were violated in the case of Navajo children when federal grants to a public school district were misused.)

All of these points were considered by the court below and demonstrate that as regards Section 1983 White Mountain and the instant case are vastly different. The points of similarity which made them "indistinguishable" in terms of state taxing powers (Petition at 13) have little bearing on the question presented here, which in any case was neither addressed nor decided in either Bracker or Ramah.

CONCLUSION

For the foregoing reasons the Petition for Writ of Certiorari should be denied.

Respectfully submitted:

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Counsel for Respondent

October 1986.

APPENDIX A

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

Friday, February 14, 1986

NO. 16,235

BUREAU OF REVENUE, STATE
OF NEW MEXICO,

Petitioner,

vs.

RAMAH NAVAJO SCHOOL BOARD, INC.,
and LEMBKE CONSTRUCTION,

Respondents.

This matter coming on for consideration by the Court upon Motion of Respondent to correct the record and for leave to file a response, and the Court having considered said motion and being sufficiently advised;

NOW, THEREFORE, IT IS ORDERED that Motion to correct the record and for the leave to file a response is hereby granted.

ATTEST:

Rose Marie Alderete
Clerk of the Supreme Court
of the State of New Mexico

....

IN THE SUPREME COURT
STATE OF NEW MEXICO

RAMAH NAVAJO SCHOOL BOARD, INC.
AND LEMBKE CONSTRUCTION CO., INC.

Petitioners-Appellees,

vs. No. 16,235

BUREAU OF REVENUE, STATE OF NEW MEXICO, Court of Appeals No. 7960

Respondent-Appellant.

MOTION TO CORRECT RECORD AND FOR LEAVE TO FILE RESPONSE

COMES NOW the Appellee, Ramah Navajo School Board, Inc., by and through Michael P. Gross, its attorney, and moves this Court under Civil Appellate Rules 8(f) and 16, in order to effect substantial justice that it grant leave to correct the record by inclusion of the attorney's affidavit in support of Plaintiffs' motion for attorney's fees considered by the trial court and for leave to file a short response to the Petition for Certiorari out of time....

Respectfully submitted:

ROTH, VAN AMBERG, GROSS,
AMARANT & ROGERS

By /s/ Michael P. Gross
Michael P. Gross
347 East Palace Ave.
Post Office Box 1447
Santa Fe, NM 87504-1447
505/988-8979

CERTIFICATE OF SERVICE

I, the undersigned, certify that a true and correct copy of the foregoing Motion to Correct Record and for Leave to File Response was maield first class postage prepaid to Gerald B. Richardson, P.O. Box 630, Santa Fe, New Mexico, 87509 on this 13th day of February, 1986.

/s/ Michael P. Gross
MICHAEL P. GROSS

....

EXHIBIT "A"

STATE OF NEW MEXICO COUNTY OF SANTA FE

IN THE DISTRICT COURT
FIRST JUDICIAL DISTRICT

RAMAH NAVAJO SCHOOL BOARD, INC.
and LEMBKE CONSTRUCTION CO., INC.,

Petitioners,

v. Civ. No. SF 78-438

BUREAU OF REVENUE OF NEW MEXICO,

Respondent.

ATTORNEY'S AFFIDAVIT
IN SUPPORT OF MOTION
FOR ATTORNEY'S FEES

I, the undersigned, being first duly sworn hereby depose and state:

1. I am the attorney of record for the Ramah Navajo School Board, Inc. and Lembke Construction Co., Inc., the Petitioners in the above-styled action.

....

4. By agreement between the Petitoners, all legal costs connected with this action have been assumed by the Ramah Navajo

School Board, Inc. In turn, the Ramah Navajo School Board, Inc., paid for legal services on this matter on an hourly basis from date of filing the claim for refund through the appeal to the New Mexico Court of Appeals. Thereafter, and for the balance of the case, fees have and will be paid on a contingent basis determined by the level of recovery, if any, of refunds and other payments by the Board. The attached summary sheet of time sheets shows that over two-thirds of the legal services on this case have been performed on a contingent fee basis.

....

/s/ Michael P. Gross
MICHAEL P. GROSS

State of New Mexico)
)ss.
County of Santa Fe)

SUBSCRIBED AND SWORN to before me this 6th day of October, 1982.

/s/
NOTARY PUBLIC

My commission expires:

8/24/86

....

APPENDIX B

ARIZONA COURT OF APPEALS

CENTRAL MACHINERY CO. v. ARIZONA

No. 1 CA-CIV 7779 (Ariz. Ct. App., June 27, 1985)

Summary

In Central Machinery Co. v. Arizona State Tax Comm'n, 488 U.S. 160 (1980), the Supreme Court held that the Indian trader statutes preempted Arizona's imposition of a transaction privilege tax on the sale of tractors to an enterprise of the Gila River Indian Tribe. On remand, Central Machinery seeks to recover attorney fees under 42 U.S.C. §1988 arguing that its preemption claim is cognizable under 42 U.S.C. §1983. The superior court agreed and awarded fees to Central Machinery. The state of Arizona appealed.

The court of appeals affirms the ruling of the superior court holding that the Indian trader statues created enforceable rights cognizable under 42 U.S.C. §1983,

the Civil Rights Act of 1871. Since the attorney fees provision of 42 U.S.C. §1988 is applicable to section 1983 claims, Central Machinery is entitled to attorney fees. In reaching its decision, the court relies on the Supreme Court's discussion of the Indian trader statutes in Warren tRading Post Co. v. Arizona State Tax Comm'n, 380 U.S. 685 (1965), and Congress' intent "to protect Indians against prices deemed unfair or unreasonable by the Indian Commissioner."

Full Text

Before MEYERSON, GRANT and HAIRE,

Appellate Judges

MEYERSON, Presiding Judge

In Maine v. Thiboutot, 448 U.S. 1, 100 S. Ct. 2502, 65 L.Ed.2d 555 (1980), the United States Supreme Court held that 42 U.S.C. § 1983 provides a cause of action to enforce substantive rights granted by federal statutes. The issue in this case

is whether the Indian trader statutes, 25 U.S.C. §§ 261-64, create such rights thereby entitling plaintiff-appellee Central Machinery Company (Central Machinery) to recover attorney's fees under 42 U.S.C. §1988.[1] We hold that substantive rights are created by the Indian trader statutes and therefore affirm the trial court's judgment granting fees to Central Machinery.

I. Background

This dispute began in 1973 when Central Machinery sold farm tractors to Gila River Farms, an enterprise of the Gila River Indian Tribe (tribe). The state of Arizona imposed a transaction privilege tax on the sale of the tractors. The tax was passed on to Gila River Farms. Central Machinery

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[1]The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988, authorized reasonable attorney's fees to the prevailing party in actions brought under certain statutes, including 42 U.S.C. §1983.

paid the tax under protest and initiated state administrative proceedings to claim a refund.

Central Machinery's claim ultimately reached the United States Supreme Court. Central Machinery Co. v. Arizona State Tax Comm'n, 448 U.S. 160, 100 S. Ct. 2592, 65 L.Ed.2d 684 [7 Indian L. Rep. 1040] (1980). Relying upon its earlier decision in Warren Trading Post Co. v. Arizona State Tax Comm'n, 380 U.S. 685, 85 S. Ct. 1242, 14 L.Ed.2d 165 (1965), the Court held that the Indian trader statutes preempted Arizona's imposition of sale tax on the transaction.

On remand, Central Machinery attempted to recover attorney's fees under 42 U.S.C. §1988. It argued that its preemption claim was cognizable under 42 U.S.C. §1983 thereby entitling it to an award of fees. The superior court granted fees to Central

Machinery[2] and defendant-appellant state of Arizona has filed this appeal.

II. 42 U.S.C. §1983

The Civil Rights Act of 1871, 42 U.S.C. §1983, establishes a cause of action on behalf of any party who has been injured, under color of law, through the deprivation of any "rights, privileges, or immunities secured by the Constitution and laws" of the United States. The question before the Supreme Court in Maine v. Thiboutot was "whether the phrase 'and laws,' as used in §1983, means what it says, or whether it should be limited to some subset of laws." 448 U.S. 4. The Supreme Court rejected the contention that the phrase "and laws" should be read as limited to civil rights or equal protection laws. The Court held that 42 U.S.C. §1983 encompassed claims

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[2]The parties agreed that Gila River Farms would bear the costs and legal fees throughout the litigation and that any recovery of fees would be transmitted to it.

based on purely statutory violations of federal law and further concluded that the attorney's fees provisions of 42 U.S.C. §1988 were therefore applicable.

In Pennhurst State School & Hospital v. Halderman, 451 U.S. 1, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981), the Supreme Court indicated in dictum that two factors may limit the existence of a cause of action under section 1983. First, the statute must provide substantive rights to those who seek to bring an action to enforce the statute. Second, the Court indicated that there might be no remedy under section 1983 if any express remedy contained in the statue is exclusive. The second limitation was expanded upon in Middlesex County Sewerage Authority v. National Sea Clammers Ass'n, 453 U.S. 1, 101 S.Ct. 2615, 69 L.Ed.2d 435 (1981). In that decision, the Court found that expressly created statutory remedies in two federal statutes

manifested congressional intent that a supplemental remedy under 42 U.S.C. §1983 was precluded.

The Indian trader statutes make no reference to any statutory remedy. Therefore, we are not concerned in this decision with the second limiting factor enunciated by the Supreme Court. Rather, we are concerned with the first limitation, namely whether the Indian trader statutes create enforceable rights.

III. Indian Trader Statutes

Comprehensive federal regulation of Indian traders has existed from 1790 until the present day. The Commissioner of Indian Affairs is vested with the "sole power and authority to appoint traders to the Indian tribes" and to specify the "kind and quantity of goods and the prices at which such goods shall be sold to the Indians." 25 U.S.C. §261. Pursuant to the authority of the Indian trader statutes,

the Commissioner of Indian Affairs has promulgated detailed regulations prescribing the manner in which trade shall be carried on with Indians. See generally 25 C.F.R. §§140.1, - .26 (1984). In Warren Trading Post Co., the United States Supreme Court held that the Indian trader statutes and the regulations promulgated thereunder preempted the ability of the state of Arizona to impose a sales tax upon a company engaged in retail trading business with Indians on the Arizona part of the Navajo Indian Reservation. In Central Machinery Co. v. Arizona State Tax Comm'n, the Court extended its holding in Warren Trading Post Co. to a situation involving an Indian trader who was not licensed and who did not have a permanent place of business on the reservation.

The Supreme Court's characterization of the Indian trader statutes in Warren Trading Post Co. is determinative of this

appeal:

> We think the assessment and collection of this tax would to a substantial extent frustrate the evident congressional purpose of ensuring that no burden shall be imposed upon Indian traders for trading with Indians on reservations except as authorized by Acts of Congress or by valid regulations promulgated under those Acts. This state tax on gross income would put financial burdens on appellant or the Indians with whom it deals ... and could thereby disturb and disarrange the statutory plan Congress set up in order to protect Indians against prices deemed unfair or unreasonable by the Indian Commissioner.

380 U.S. at 690-91 (emphasis added). The Court's description of the Indian trader statutes reflects its conclusion that Congress' intent in passing the statutes was to "protect Indians against prices deemed unfair or unreasonable by the Indian Commissioner." We conclude that the Indian trader statutes therefore establish enforceable rights and thus fit within the phrase "and laws" contained in 42 U.S.C. § 1983. See Chase v. McMasters, 573 F.2d 1011 [5 Indian L. Rep. C-8] (8th Cir.

1978), cert. denied, 439 U.S. 965, 99 S.Ct. 453, 58 L.Ed. 2d 423 (1978).

IV. Analysis

We believe that our conclusion is also supported by the decision of the Ninth Circuit Court of Appeals in White Mountain Apache Tribe v. Williams, No. 81-5348 (11 Indian L. Rep. 2056] (9th Cir., Feb. 7, 1984), rehearing granted, (April 25, 1984). in that case, the court held that pre-emption of Arizona state taxes by a federal law regulating the harvest and sale of tribal timber did not create rights enforceable under section 1983. The court's reasoning combined with the interpretation of the Indian trader statutes given by the Supreme Court in Warren Trading Post Co. requires that we reach the contrary result in the present case.

In White Mountain apache Tribe, the court noted that the "availability of a

§1983 cause of action for state violations of federal statutory law depend[s] upon congressional intent in passing the statute at issue." Slip op. at 14. The court recognized that a preemption claim under a federal statute may give rise to a section 1983 cause of action. Id. at 16. But cf. Gould, Inc. v. Wisconsin Dept. of Industry, Labor and Human Relations, 750 F.2d 608 (7th Cir. 1984), review granted, 53 U.S.L.W. 3821 (U.S., May 20, 1985) (No. 84-1484). As the court noted, the question becomes one of congressional intent.[3]

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[3]Despite a persuasive dissent, a majority of the court found that the central purpose of the federal law regulating the harvest of timber on Indian reservations was merely to grant to the Secretary of the Interior authority to regulate the harvest and sale of the tribe's own timber. Thus, the court concluded that the statute created no new rights. The court further concluded that Congress' purpose in promoting tribal self-government likewise gave rise to no rights cognizable under section 1983. The court viewed the federal statute as allocating the power to tax the timber activities among different sovereigns and that the distribution of such powers between a state

In light of Warren Trading Post Co., we must necessarily conclude that the Indian trader statutes do evidence a congressional intent to create enforceable rights. As explained by the United States Supreme Court, the purpose behind these statutes is to "protect Indians against prices deemed unfair or statutes is to "protect Indians against prices deemed unfair or unreasonable by the Indian Commissioner." 380 U.S. at 691. We view this statement as an express indication by the Supreme Court that Congress intended that for the benefit and protection of Indians, the tribes were entitled to the right to be free from state taxation on their transactions with traders.

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and an Indian tribe was outside the scope of section 1983.

The dissent concluded that the federal law reflected a congressional intention to benefit specially Indian tribal timberland owners and to confer federal rights upon them. The dissent appears to us to have the better argument.

The state of Arizona relies heavily on Consolidated Freightways Corp. v. Kassel, 730 F.2d 1139 (8th Cir. 1984), cert. denied, ___ U.S. ___, 105 S.Ct. 126, ___ L.Ed.2d ___ (1984). In that decision, the plaintiff had been successful in invalidating Iowa's ban on 65-foot twin trailer trucks under the commerce clause. The plaintiff then sought fees alleging that the commerce clause claim was cognizable under section 1983. The court rejected the request finding that the commerce clause did not grant enforceable rights but rather allocated power between the state and federal governments. Id. at 1144. Thus, the decision is not at all analogous because here we are concerned with a supremacy clause claim predicated upon a federal law which has as its avowed purpose the protection of Indians in their business relationships with traders.

Our holding is also consistent with the

Ninth Circuit decision in Boatowners and Tenants Ass'n v. Port of Seattle, 716 F.2d 669 (9th Cir. 1983). In that decision, the court rejected the contention that the plaintiffs had a section 1983 claim under the River and Harbor Improvements Act. The court found that the purpose of the Act was to "improve navigation, enhance commerce, and reduce vehicle-vessel traffic problems, all to the benefit of the general public." Id. at 673 (emphasis added). The court concluded that there was no "evidence whatsoever of an intent" to create "any special benefit" for the class of pleasure craft owners. Id. at 673-74. The River and Harbor Improvements Act can be easily contrasted with the Indian trader statutes by virtue of the supreme Court's clear characterization of Congress' intent under the Indian trader statutes to benefit and protect Indians in their dealings with traders.

The Ninth Circuit Court of Appeals in White Mountain Apache Tribe acknowledges that claims under the supremacy clause may involve rights enforceable under section 1983. For the foregoing reasons, we hold that such a claim has been presented in this matter and we therefore affirm the ruling of the superior court.[4]

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[4]The state's final argument can be easily dismissed. The state argues that only Congress, not the courts, can authorize attorney's fees. Alyeska Pipeline Serv. Co. v. Wilderness Society, 421 U.S. 420, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975). Because the Indian trader statutes make no reference to fees, the state alleges that a few award is impermissible. But Congress has expressly provided for an award of fees in section 1983 suits. 42 U.S.C. §1988. We have determined that Central Machinery's claim is one properly brought under section 1983 and therefore the provisions of 42 U.S.C. §1988 are applicable.

APPENDIX C

INDIAN SELF-DETERMINATION ACT REGULATIONS, 25 C.F.R. PART 271 AND PART 274

RULES AND REGULATIONS
SUBPART A——GENERAL PROVISIONS
(EXCERPTS)

§ 271.1 Purpose and scope.

(a) The purpose of the regulations in this Part is to give the application and approval process for non-profit contracts with the Bureau under section 102 of Title I of the Indian Self-Determination and Education Assistance Act (Public Law 93-638, 88 Stat. 2203). Title I is known as the Indian Self-Determination Act. Contracts under the Act include "tribal governmental functions" as defined in § 271.2(q), "business related functions" as defined in § 271.2(d), and certain contractable trust resources programs or parts of programs as set forth in § 271.32. The nature of contracts with Indian entities which do not fall within the purview of the Act, including contracts which may provide for profit, and the conditions for entering into such contracts, are set forth in the regulations implementing the Act of June 25, 1910 (36 Stat. 861, 25 U.S.C. 47), commonly referred to as the "Buy Indian" Act.

(b) Section 104 of Title I of the Act provides authority for making grants for certain purposes. It is the Bureau's policy to make grants for the purposes specified in Section 104 of the Act in lieu of contracts, Part 272 of this chapter gives the procedures and requirements for obtaining grants under section 104 of the Act.

(c) Nothing in these regulations shall be construed as:

(1) Affecting, modifying, diminishing, or otherwise im-

pairing the sovereign immunity from suit enjoyed by an Indian tribe;

(2) Authorizing or requiring the termination of any trust responsibility of the United States with respect to the Indian people; or

(3) Permitting significant reduction in services to Indian people as a result of this Part.

(d) Nothing in these regulations shall be construed to mandate a tribe to apply for a contract or contracts with the Bureau to plan, conduct, and administer all or parts of any Bureau program. Such applications under these regulations are strictly voluntary.

§ 271.2 Definitions

(i) "Indian" means a person who is a member of an Indian tribe.

(j) "Previously private school" means a school (other than a Federal school formerly operated by the Bureau) that is operated primarily for Indian students in any grade or grades from age 3 years through grade(s) 12; and, which at the time of application is controlled, and sanctioned or chartered by the governing body(s) of an Indian tribe(s).

(n) "Superintendent" means the official in charge of a Bureau of Indian Affairs agency office except that:

(2) The term means the Chief, Division of Facilities Engineering, for matters regarding contracting for all or part of the construction, building, and utilities program which is contractable under this part and which is within the responsibility of the Division of Facilities Engineering.

(p) "Tribal government, "tribal governing body" and "tribal council" means the recognized governing body of an Indian tribe.

(q) "Tribal governmental function" means all programs authorized to be administered by the Bureau for the benefit of Indians enumerated as line items in the Bureau's annual budget requests under the Activities of Education and Indian Services, the Subactivities of Direct Employment and Road Maintenance, and those programs related to Irrigation and Power Operation and Maintenance identified as a part of the subactivity minerals, mining, irrigation and power under the Activity of Tribal Resources Development.

(r) "Tribal organization" means the recognized governing body of any indian tribe; or any legally established organization of Indians or tribes which is controlled, sanctioned, or chartered by such governing body or bodies or which is democratically elected by the adult members of the Indian community to be served by such organization and which includes the maximum participation of Indians in all phases of its activities; *Provided,* That a request for a contract must be made by the tribe that will receive services under the contract; *Provided further,* That in any case where a contract is let to an organization to perform services benefiting more than one Indian tribe, the approval of each such Indian tribe shall be a prerequisite to the letting of such contract.

§ 271.4 Statement of policy.

(a) The Congress has recognized the obligation of the United States to respond to the strong expression of the Indian people for self-determination by assuring maximum Indian participation in the direction of educational as well as other Federal services to Indian communities so as to render such services more responsive to the needs and desires of those communities.

(b) The Congress has declared its commitment to the

maintenance of the Federal Government's unique and continuing relationship with and responsibilities to the Indian people through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from Federal domination of programs for and services to Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services.

PART 274——SCHOOL CONSTRUCTION CONTRACTS OR SERVICES FOR TRIBALLY OPERATED PREVIOUSLY PRIVATE SCHOOLS

SUBPART A——GENERAL PROVISIONS

§ 274.1 Purpose

The purpose of the regulations in this Part is to give the application and approval process for obtaining a contract or services from the Bureau for school construction for previously private schools now controlled and operated by tribes or tribally approved Indian organizations under sections 204 and 208 of Title II of the Indian Self-Determination and Education Assistance Act (Pub. L. 93-638. 88 Stat. 2203).

§ 274.2 Scope.

The Act authorizes the expenditure of funds authorized and appropriated under Part B of the Act to contract or provide for tribally operated previously private schools. After an application has been completed and approved by the tribe, the application is forwarded through Bureau channels to the Commissioner for ranking by priority. If a project is within the funding priority, the Bureau contracting officer offers to negotiate a contract with the applicant subject to approval by the requesting tribe(s) for planning,

architectural-engineering design, facilities, construction, and purchase of equipment to provide educational facilities meeting Bureau space standards and construction code regulations. Subject to approval by the requesting tribe(s), the applicant then has the following options:

(a) Enter into a contract with the Bureau under which the applicant performs all or part of the necessary work with the Bureau performing the rest.

(b) Request that the Bureau perform or arrange for the performance of all the necessary work.

[40FR 51303, Nov. 4, 1975, as amended at 43 FR 37445, Aug. 23, 1978]

§ 274.3 Definitions

As used in this Part:

(a) "Act" means the Indian Self-Determination and Education Assistance Act (Pub. L.93-638.88 Stat. 2203).

(n) "Previously private school" means a school (other than a Federal school formerly operated by the Bureau), that is operated primarily for Indian students from age 3 years through grade(s) 12; and, which at the time of application is controlled, sanctioned, or chartered by the governing body(s) of an Indian tribe(s).

APPENDIX D

25 CFR PART 32., EXCERPTS, IMPLEMENTING PUBLIC LAW 95-561, TITLE XI 25 U.S.C. §§2001-2019.

PART 32 ——INDIAN EDUCATION POLICIES

§32.1 Purpose and scope.

The purpose of the Part is to state the policies to be followed by all schools and education programs under the jurisdiction of the Bureau of Indian Affairs. Contract schools operated by Indian Tribes or Alaska Native entities may develop their independent policies, consistent with contractual obligations, or adhere to these. The adherence to the appropriate policies shall reflect the best interests of the student, the Federal government, the Tribes and Alaska Native entities, and shall be based on educationally sound judgment.

§32.3 Mission statement

Recognizing the special rights of Indian Tribes and Alaska Native entities and the unique government-to-government relationship of Indian Tribes and Alaska Native villages with the Federal Government as affirmed by the United States Constitution, United States Supreme Court decisions, treaties, Federal statutes, and Executive Order, and as set out in the Congressional declaration in sections 2 and 3 of the Indian Self-Determination and Education Assistance Act (Pub. L. 93-638; 88 Stat. 2203; 25 U.S.C. 450 and 450a), it is the responsibility and goal of the Federal government to provide comprehensive education programs and services for Indians and Alaska Natives. As

acknowledged in section 5 of the Indian Child Welfare Act of 1978 (Pub. L. 95-608; 92 Stat. 3069; 25 U.S.C. 1901), in the Federal Government's protection and preservation of Indian Tribes and Alaska Native villages and their resources, there is no resource more vital to such Tribes and villages than their young people and the Federal Government has a direct interest, as trustee, in protecting Indian and Alaska native children, including their education. The mission of the Bureau of Indian Affairs, Office of Indian Education Programs, is to provide quality education opportunities from early childhood through life in accordance with the Tribes' needs for cultural and economic well-being in keeping with the wide diversity of Indian Tribes and Alaska Native villages as distinct cultural and governmental entities. The Bureau shall manifest consideration of the whole person, taking into account the spiritual, mental, physical and cultural aspects of the person within family and Tribal or Alaska Native village contexts.

§32.4 Policies

(n) *Priorities in contracts and grants.* Provide financial support through contracts, grants or other funding mechanisms with first priority given to the Tribes and Alaska Native entities, Tribal organizations, Tribally controlled community colleges, and Indian or Alaska Native professional or technical assistance organizations which have the sanction of the benefitting Tribes and Alaska Native entities.

(o) *Community school concept.* Promote the community school concept by encouraging year around multi-use of educational facilities, equipment and services for Tribal, Alaska Native village and community development.

(p) *Education close to home.* Provide day and residential educational services as close to an Indian or Alaska Native

student's home as possible, except when a student elects to attend a school elsewhere for specialized curricular offerings or services.